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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DALE H. SUNDBY,

Plaintiff and Appellant,

v.

THE BANK OF NEW YORK MELLON  
et al.,

Defendants and Respondents.

D060268

(Super. Ct. No. 37-2011-00083329-  
CU-OR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Jeffrey B.  
Barton, Judge. Affirmed.

Dale H. Sundby appeals the trial court's denial of his preliminary injunction motion seeking to restrain defendants The Bank of New York Mellon, Wells Fargo Bank (Wells Fargo), and First American Title Insurance Company (First American) from selling his property or evicting him from it. He contended in the trial court that First American was not the trustee when it recorded the notice of default; therefore, the notice

of default was void ab initio, and any notice, sale or deed based on it was also void by law. We affirm.

## BACKGROUND

In December 2005, Sundby executed a promissory note in favor of Wells Fargo for a \$1,000,000 loan secured by real property on 7748 Eads Avenue in La Jolla, California. The deed of trust securing the note defines the lender as Wells Fargo and the trustee as Fidelity National Title Insurance Company and states: "Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. . . . This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution." The deed further provides: "If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall cause this notice to be recorded in each county in which any part of the property is located."

On December 1, 2009, First American recorded a notice of trustee's sale notifying Sundby of his default under the deed of trust and the possible sale of the property under Civil Code, section 2924c, subdivision (b)(1).<sup>1</sup>

On January 6, 2010, a substitution of trustee was recorded, naming First American as the replacement trustee.

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<sup>1</sup> All statutory references are to the Civil Code.

In March 2010, First American recorded a notice of trustee's sale of the property.

In May 2010, First American recorded an assignment of deed of trust to The Bank of New York Mellon.

In January 2011, First American recorded a trustee's deed upon sale of the property to The Bank of New York Mellon.

In January 2011, Sundby and his wife, Edith Sundby, sued defendants in state court for declaratory relief, misrepresentation and fraud, and intentional and negligent infliction of emotional distress. Defendants removed the matter to federal court based on diversity jurisdiction.

In May 2011, the Sundbys filed in federal court an amended complaint adding causes of action "to set aside trustee's sale" and "to void or cancel trustee's deed upon sale." The Sundbys also moved ex parte for a temporary restraining order and preliminary injunction to restrain defendants from pursuing an unlawful detainer action against them. The Sundbys argued in support of the motion that The Bank of New York Mellon "knew that Sundby's wife has late-stage terminal cancer, receives home care, and any eviction attempt while this unlimited civil case is active would be premature, unnecessary, and traumatizing—an intentional and negligent infliction of emotional distress;" nonetheless, The Bank of New York Mellon caused a sign to be posted on the property stating that title to it was in litigation.

The federal court granted the Sundbys' motion to remand the matter back to the superior court, which denied the preliminary injunction motion. The superior court acknowledged that although First American recorded the notice of default in December

2009, its substitution as a trustee came approximately three weeks later, in January 2010. But the court noted, "First American was listed 'as Agent for the current beneficiary under a Deed of Trust dated [December 5, 2005], executed by [] Sundby.' " The court determined that the trustee's sale was valid and the Sundbys were required to tender the amounts due even if there were other irregularities of the foreclosure process.

The court rejected the Sundbys' claims that all actions taken after the notice of default were void, and that the terms of the deed control over the foreclosure statutes, concluding the Sundbys had not cited any case that would require it to find the entire foreclosure sale should be set aside because the notice of default was defective. The court acknowledged Mrs. Sundby's health problems, but ruled, "[T]he first issue in granting an injunction is the likelihood of success on the merits. Only after that question is answered in the affirmative can the court balance the respective hardships. Under the current state of the law, the court is unable to make the likelihood of success on the merits finding necessary for issuance of an injunction."

## DISCUSSION

Sundby contends that First American had not yet been substituted as trustee when it recorded the notice of default and therefore that notice was void and all subsequent actions based on it also were void. Sundby further contends section 2924 is only "limiting and the power of sale provisions in the deed of trust govern." Sundby also contends he was not required to tender the amounts due in order to avoid foreclosure.

We review an order granting or denying a preliminary injunction under an abuse of discretion standard. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999.) "As its

name suggests, a preliminary injunction is an order that is sought by a plaintiff *prior to a full adjudication of the merits of its claim*. [Citation.] To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits. [Citation.] [¶] . . . [A]s a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) The court will deny a preliminary injunction unless there is a reasonable probability that the plaintiff will be successful in his or her claims. (*Weingand v. Atlantic Sav. & Loan Assn.* (1970) 1 Cal.3d 806, 820.)

In California, the regulation of nonjudicial foreclosures pursuant to a power of sale is governed by the " 'comprehensive framework' " of sections 2924 through 2924k. (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, quoting *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830; see also *Ung v. Koehler* (2005) 135 Cal.App.4th 186, 202 [exercise of power of sale in a deed of trust " 'is carefully circumscribed by statute' "]; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 86.) The statutory scheme is intended to be "exhaustive" and courts will not incorporate unrelated provisions into statutory nonjudicial foreclosure proceedings. (See *Moeller*, at p. 834.) "The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly

conducted sale is final between the parties and conclusive as to a bona fide purchaser." (*Id.* at p. 830.)

Notably, section 2924, subdivision (a)(1) permits a notice of default to be filed by the "trustee, mortgagee, or beneficiary, or any of their authorized agents." (See also section 2924b(b)(4) ["A 'person authorized to record the notice of default or notice of sale' shall include an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee"].) There is abundant federal authority in accord. (*Morgera v. Countrywide Home Loans* (E.D.Cal., Jan. 11, 2010, No. 2:09-cv-01476-MCE-GGH) 2010 WL 160348, [citing cases]; *Linkhart v. US. Bank Nat. Ass'n.* (S.D.Cal., May 17, 2010, No. No. 10–CV–688 JLS (WMc)) 2010 WL 1996895; *Perlas v. Mortgage Elec. Registration Systems, Inc.* (N.D.Cal., Aug. 6, 2010, No. No. C 09–4500 CRB) 2010 WL 3079262 ["There is no requirement in California that the foreclosure be initiated by the lender itself"].)

In *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, the plaintiff claimed wrongful foreclosure because Mortgage Electronic Registration Systems, Inc. (MERS), which initiated the foreclosure process, was neither the note's rightful owner nor acting under authority of the rightful owner. (*Id.* at p. 1152.) This court affirmed the trial court's decision to sustain a demurrer to that cause of action, pointing out that the deed of trust provided that " 'MERS (as nominee for Lender and Lender's successors and assigns) has . . . the right to foreclose and sell the Property.' " (*Id.*, at p. 1157.)

Likewise here, Sundby signed the deed of trust, a provision of which permitted Wells Fargo to execute a notice of default, which it did through its agent, First American. As stated in another case, "In general terms, an agent can be authorized to do any act the principal may do." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 271.) Notwithstanding that when First American recorded the notice of default it had not yet become the substitute trustee, it was acting as the authorized agent of Wells Fargo, the beneficiary of the deed of trust. Therefore, its actions were permissible under section 2924, subdivision (a)(1).

In *Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204 Cal.App.4th 433, the plaintiff complained the notice of default was defective in part because there was no record of a substitution of trustee. The court relied on *Fontenot* and ruled, "a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate [that] the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests." (Accord, *Melendrez v. D & I Investment, supra*, 127 Cal.App.4th at p. 1257 [presumption that nonjudicial foreclosure sale was conducted regularly and fairly may be rebutted only by substantial evidence of "prejudicial procedural irregularity"].) Sundby has not identified any prejudice he suffered from any technical defect in the notice of default. We note that approximately one month after First American recorded the notice of default its substitution as trustee was formalized. Further, when the sale was conducted, First American's substitution as trustee had been formalized.

We conclude the trial court did not abuse its discretion in denying the preliminary injunction. There is no reasonable probability that Sundby would succeed in his lawsuit

because both the statutory language governing nonjudicial foreclosures and the terms of the deed of trust permitted First American, as Wells Fargo's agent, to record the notice of default. Further, the Sundbys failed to demonstrate prejudice; accordingly, there is no legal basis for a finding that a defective notice of default voids any sale or deed based on it.

#### DISPOSITION

The order is affirmed. The Bank of New York Mellon, Wells Fargo Bank, and First American Title Insurance Company are awarded costs on appeal.

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O'ROURKE, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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McDONALD, J.